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**PROSPECTS AND CHALLENGES OF AN IMPROVED COMPANIES ACT DISPUTE  
RESOLUTION FRAMEWORK: A STUDY FOR THE CREATION OF ZAMBIA'S  
COMPANIES TRIBUNAL**

**BY**

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**Research dissertation submitted for the approval of the University of Lusaka  
Senate in partial fulfilment of the requirements for the award of the Master of  
Laws Degree in Commercial Law (LLM)**

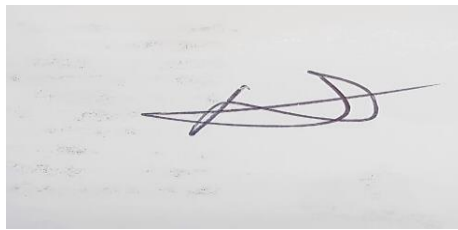
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## **DECLARATION**

I hereby certify that; Prospects and Challenges of an improved companies act dispute resolution framework: a study for the creation of Zambia's Companies Tribunal, which is submitted for the award of a Master of Laws (LLM) degree at the University of Lusaka, School of Law, is my original work and has not been submitted for the award of a degree at this or any other tertiary institution previously.

The sources that have been cited or used have been properly cited with full citations. The author alone is to blame for any errors or omissions.

A photograph of a handwritten signature in blue ink on a light-colored surface. The signature is stylized and appears to read 'IVOR MUKWANKA'.

**IVOR MUKWANKA MAY, 2024**

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## **ABSTRACT**

Businesses are crucial to the economy of every nation and thus their efficient functioning is cardinal. The regulatory environment in a nation plays a major role in determining the growth and development of its economy. A number of developing nations have recently implemented dispute regulatory reforms aimed at improving the ease of doing business in their respective nations. This is in recognition of the significant role that companies and businesses in general play in an economy. Zambia is not an exception. It has been argued that Zambia has for a long time not created an environment that makes it easy for doing business and thus unlocking its potential to become an economic powerhouse. This is the reason that motivated this research into how we can unlock certain legal impediments to achieving the much talked about, “ease of doing business.”

The dissertation examines the framework for resolving disputes under the Zambian Companies Act in relation to improving Zambia's competitiveness in terms of ease of doing business. This examination is conducted in an attempt to assess the framework. This study used various methods of collecting data including qualitative and quantitative data collection techniques. The important information was gathered through studying documentary sources such as journals, case law, Zambian legislation as well as scholarly works by other writers. The dissertation asserts that because the Companies Act resolution framework is primarily based on the court process, it does not support Zambia's efforts to improve the ease of doing business with regard to dispute resolution. A comparative analysis of current trends in company law dispute resolution is conducted, demonstrating a move towards tribunal-based dispute determination and away from reliance on the courts as the primary dispute resolution forum.

In the end, the dissertation has recommended creating a Companies Tribunal for Zambia as a step that would ease doing business in Zambia and help reduce the cost of resolving commercial disputes, at least in the context of the Companies Act. A hybrid tribunal suitable to Zambia is recommended. In this regard, it is proposed that decisions of the registrar relating to incorporation and conversion of companies, company

accounts, audit, annual returns, and foreign companies should no longer be appealable to the High Court. They should be amenable to the exclusive jurisdiction of the proposed tribunal in order to render the remedies envisaged in the right to challenge such decisions relevant and practicable. It is also recommended that offences in the Companies Act that are punishable by a fine should be made civil wrongs over which the proposed tribunal should have jurisdiction and be empowered to impose administrative fines.

## **DEDICATION**

To Ntembe, Lushomo and Chanda continue pursuing academic excellence, with success in school comes great things in life.

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I wish to thank my wife Doreen Nkombo Chibomba for her invaluable support and sacrifice in my career and academic pursuance, and for her untiring editing of this dissertation.

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## CHAPTER ONE

### A DISCOURSE ON THE NEED FOR AN IMPROVED DISPUTE RESOLUTION OF COMPANIES THROUGH AN INCLUSION OF A COMPANIES TRIBUNAL

#### 1.0. INTRODUCTION

This is an introductory chapter. It is a launch pad for further discussions and analysis. Since the focus of the dissertation is the establishment of a Companies Tribunal in Zambia, it is imperative that an introduction to tribunals be provided, starting from a common law standpoint. In light of this, the first section of this chapter briefly defines the term "tribunal" and emphasises the importance of tribunals in the legal system. The dissertation's purpose is then explained, after which the research question is put forth.

By virtue of the dissertation providing a comparative study of some jurisdictions that have established or provided for tribunals or similar frameworks for certain company law matters, justification for the selection of the jurisdictions to be compared is given after the research question. The literature review is then presented, followed by a brief commentary on the research strategy used for the dissertation. A summary of the next few chapters is provided at the end of the chapter.

#### 1.1 A DISCOURSE OF COMMON LAW JURISDICTIONS' TRIBUNALS

There appears to be no consensus on the definition of the term "tribunal." However, its meaning is informed by context or jurisdiction.<sup>1</sup> For instance, a "tribunal" has been described as "a court of justice and a seat for a judge or judges" in the ordinary sense of the word.<sup>2</sup> This notwithstanding, a court or a judge's seat are not included in the definition of a tribunal in the context of this dissertation. Given this, it makes sense to think about what a "tribunal" means in the context of this dissertation.

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<sup>1</sup>Carnwath & Murray Chitra et al 'An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' in Robin Creycke (ed) *Tribunals in the Common Law World* (2008) 2.

<sup>2</sup> C. Soanes & A. Stevenson (eds) *Concise Oxford English Dictionary* 11 ed (2008) 1539.

"Set up by statute and existing outside the usual judicial hierarchy of the courts," a tribunal is an entity "with judicial or quasi-judicial functions." Some have criticised this definition for not being comprehensive. This is because "tribunal"<sup>3</sup> has been described as a "basket word" embracing many different institutions in current legal parlance.<sup>4</sup> However, for purposes of this dissertation, it is largely sufficient, as will become clear in due course.

It is significant that tribunals typically handle cases involving the resolution of claims made against the State.<sup>5</sup> They frequently resolve conflicts between both natural and legal persons.<sup>6</sup> Tribunals handle a variety of cases, from straightforward tax disputes to more complicated cases.<sup>7</sup>

It is indisputable that tribunals play a crucial role in the legal systems of many nations. A central role for tribunals in a justice system is suggested by the development of a unified tribunal system in the United Kingdom,<sup>8</sup> the Administrative Appeals Tribunal in Australia, the National Consumer Tribunal and the Companies Tribunal in South Africa,<sup>9</sup> and the Competition and Consumer Protection Tribunal that was established in Zambia.<sup>10</sup>

For many reasons, tribunals offer a much-needed substitute for the frequently costly, time-consuming, complex, inflexible, and drawn-out courtroom litigation. First off,

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<sup>3</sup> M. Woodley (ed) *Osborn's Concise Law Dictionary 10 ed* (2005) 406.

<sup>4</sup> *Ibid*

<sup>5</sup> Carnwath & Murray Chitra et al 'An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' in Robin Creycke (ed) *Tribunals in the Common Law World* (2008) 2.

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> *The Tribunals, Courts and Enforcement Act 2007*, provides for a unified tribunal system in the United Kingdom. The Act is available at <http://www.legislation.gov.uk/ukpga/2007/15/pdfs/ukpga07150001.pdf> accessed on 12 February 2024

<sup>9</sup> *The Administrative Appeals Tribunal Act 1975* was established by s 5 of the Administrative Appeals Act 91 of 1975, available at <http://www.comlaw.gov.au/Details/C2013C00449> accessed on 12 February 2024.

<sup>10</sup> *The Competition and Consumer Protection Tribunal Act No.24 of 2010* is a creature of s 67 of the Competition and Consumer Protection Act No.24 of 2010 available at <http://www.parliament.gov.zm> accessed on 12 February 2024.

tribunals are viewed as an adaptable method of resolving disputes that permit the creation of "procedures to suit the characteristics of the jurisdiction, and the needs of its users, be they sophisticated city institutions or unrepresented individuals." Second, it is said that permitting "questions arising under public Acts or consensual rules to be resolved as privately and expeditiously as possible" advances the public interest.

Last but not least, Lord Wilberforce described tribunals as being "set up to deal with matters of a specialised character, in the interest of economy, speed, and expertise" in **Anisminic Ltd v. Foreign Compensation Commission**.<sup>11</sup> Tribunals are acknowledged for their advantages in terms of cost, accessibility, timeliness, and availability of pertinent expertise.

## 1.2 BACKGROUND OF STUDY

The Zambian government has been implementing reforms to facilitate business transactions within the nation. The realisation that businesses in particular and the private sector in general are the main drivers of economic growth in liberalised economies like Zambia's seems to have spurred these reforms. Throughout the reform process, a number of laws have been passed, changed, or repealed to guarantee the growth of the private sector and the ensuing economy. The **Companies Act Cap 388**<sup>12</sup>, is one of the laws that have been repealed to the current **Companies Act**.<sup>13</sup> Among the changes made are those that will improve the Registrar's enforcement authority and make incorporation process more stipulated in the Act and less complicated. However, the Act has not provided for the establishment of a company's tribunal in the event of a dispute.

Although the reforms implemented so far are praiseworthy, it seems that they have concentrated more on loosening regulations to lower the cost of doing business in Zambia, among other things, and less on the equally significant issue of dispute resolution in business in general and in the context of company law specifically.

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<sup>11</sup> (1969) 2 AC 147

<sup>12</sup> Chapter 388 of the Laws of Zambia

<sup>13</sup> No.10 of 2017

It is widely acknowledged that a framework for quick, affordable, effective, flexible, and simple business dispute resolution tends to encourage business expansion, which in turn supports national economic growth. A number of nations have established or provided for tribunals to hear and decide certain matters and disputes arising from their respective laws regulating companies, ostensibly in an effort to foster business-friendly environments and promote economic growth through quick, easy, and affordable dispute resolution.

**Article 133 (2) of the Constitution of Zambia<sup>14</sup> provides that** the High Court of Zambia is the principal forum of first instance for resolving disputes in accordance with the Companies Act. In fact, it is possibly the only forum. This was the same case even in **Section 379 of the repealed Companies Act<sup>15</sup>**, which although it was concerned with appealing a decision of the Registrar to the High Court, seemingly only focused on lengthy and financially costly litigation for matters of companies. Unfortunately, this status quo has been maintained in **Section 341 of the Companies Act.<sup>16</sup>** Apart from the aforementioned, there is no provision in the Companies Act that suggests that companies should settle their disputes through a less financial and time costly tribunal.

Litigation is generally acknowledged to be expensive, complicated, and time-consuming; Zambia and many other nations share this characteristic. Therefore, in order to further facilitate business dealings and thereby foster economic growth, the necessity for less expensive, more straightforward and effective procedures for resolving certain disputes or matters arising under the Companies Act cannot be overstated.

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<sup>14</sup> Act No. 2 of 2016

<sup>15</sup> Chapter 388 of the Laws of Zambia

<sup>16</sup> No.10 of 2017

### 1.3 STATEMENT OF THE PROBLEM

The primary forum for resolving disputes in relation to companies in Zambia is through litigation in the High Court of Zambia. **Section 2 of the Companies Act<sup>17</sup>** defines a court as “the High Court for Zambia.” Therefore, the High Court is the Court through which all matters of the Companies Act referred to the Court, shall lie in the High Court.

Further, the Companies Act does not mention any other means that companies that are found to be in dispute can resort to. Even where companies are not happy with the decision of the Registrar, they have to resort to a time and financially costly way of resolving this through an appeal being lodged to the High Court as per **Section 341 of the Companies Act.<sup>18</sup>**

It is widely acknowledged that a framework for quick, affordable, effective, flexible, and simple business dispute resolution tends to support business expansion, which in turn supports national economic growth. A number of nations have established or provided for tribunals to hear and decide certain matters and disputes arising from their respective laws regulating companies. This is ostensibly in an effort to foster business-friendly environments and promote economic growth through quick, easy, and affordable dispute resolution. The only tribunal that can be pointed out in the commercial environment in Zambia is the Competition and Consumer Protection Tribunal established by **the Competition and Consumer Protection Act<sup>19</sup>** read together with the **Competition and Consumer Protection (Amendment) Act<sup>20</sup>**. However, this law does not require all matters to be brought before its tribunal as it only focuses on matters to do with this Act.

Arguably, matters that go to the High Court never easily come to an end as they are based on winning a matter. However, if a tribunal is to be set with a focus set on bringing matters to finality in the friendliest way, company disputes would end without

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<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*

<sup>19</sup> *Act No.24 of 2010*

<sup>20</sup> *Act No.21 of 2023*

companies spending so much. It is apparent that litigation matters take too long to be concluded. For example, in the case of **Chrismar Hotel Limited and Cavmont Insurance Corporation Limited**<sup>21</sup>, a dispute which started in the High Court in 2008 and ended in the Supreme Court in 2010. Obviously, the monies spent on litigation by companies are a lot and can be better used on businesses growth or expansion.

By virtue of litigation being acknowledged to be expensive, complicated, and time-consuming, it is the aim of this study to propose for the establishment of an effective tribunal to aid with the settlement of company disputes.

## **1.4 OBJECTIVES OF THE STUDY**

### **1.4.1 General Objective**

The general objective of the study is to examine the possibility of improving dispute resolving measures or mechanisms under the Companies Act.

### **1.4.2 Specific Objectives**

The following are the specific objectives of the study:

1. To critically explore and examine the Zambian legal system on company dispute resolution and the ailments the modes of resolution present on entities in the commercial environment.
2. To discuss whether mediation, does mitigate the problems presented by the current mode of dispute resolution by companies
3. To critically examine and draw some lessons of a tribunal that would best curb the problems currently existing in the Zambian commercial space with regards to dispute resolution and to suggest the best suited dispute resolution model.

## **1.5 RESEARCH QUESTIONS**

In order to sufficiently respond to the provided problem statement in this study, the following questions are asked:

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<sup>21</sup> *Appeal No. 116 of 2008*

1. What are the modes of dispute resolution for companies and what problems does the legal system of resolving disputes through litigation present to companies in Zambia?
2. What kind of dispute resolution mechanism is best suited for Zambian company law in the light of international best practices?
3. What lessons can be learned from countries that have adopted alternative dispute resolutions in the commercial space and what is the best method?

## 1.6 SIGNIFICANCE OF THE STUDY

This research is significant because not only is it going to contribute to the knowledge basket about the law that governs and dictates how disputes between companies in the commercial industry should be resolved, but it will equally contribute to the creation of a friendly commercial environment. Subsequently, this study through its suggestions will help improve the commercial law jurisprudence in that it will focus on the needs of the companies, the disadvantages of litigation to companies, and how the current position does not help grow the commercial environment.

## 1.7 LITERATURE REVIEW

**Carnwath & Murray Chitra**<sup>22</sup> aver in their writing title 'An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' that:

*“Tribunals are a great resource for supporting the legal system. Unlike courts where the losing party pays the winning party's legal fees, tribunals are more economical because there are no fees and each party bears the full cost of their representation. The fact that cases can be heard without a dedicated courtroom contributes to the cost-effectiveness of tribunals. Additionally, tribunals are less expensive because they do not require legal representation and the members of the tribunal panels are less expensive to hire than judges.”*

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<sup>22</sup> Carnwath & Murray Chitra et al 'An Overview of the Tribunal Scenes in Australia, Canada, New Zealand and the United Kingdom' in Robin Creycke (ed) *Tribunals in the Common Law World* (2008) 2.

From the above, it can be observed that tribunals are advantageous to the growth and prosperity of the commercial industry. This is because, by their nature, they allow companies to spend less on resolving their disputes and focus more on investing in the growth of the company which effectively grows the economy.

**Bloomfield, D**<sup>23</sup>. Postulates that:

*“Tribunals are an important part of the justice system. This is not only because of their potential to facilitate faster management and settlement of disputes but also their ability to deal with Tribunals within a party friendly environment and preserving friendships: This puts them at a better place to decide matters in the commercial industry.”*

**Kariuki Muigua**,<sup>24</sup> also makes the same argument as **Bloomfield, D**<sup>25</sup> above by further alluding that for an effective and progressive justice system to exist in Kenya’s commercial industry’s dispute resolution, it is tribunals that perform the supplementary function. The author states that:

*“Tribunals play an important role within the justice system in Kenya by not only reducing pressure on courts but also assessing the main problem and maintaining the friendly ties of companies in the commercial environment.”*

Mohammad Ibrahim Abdulrahim Abdulla<sup>26</sup> in his article titled **“Use of Specialised Tribunals for the Settlement of Construction Projects in Times of a Financial Crisis”** states:

*“Creating a specialized tribunal is not unheard of, nor were special tribunals invented by Dubai.<sup>15</sup> Nevertheless, Dubai’s adaptation of this form of tribunal mitigated the effects of the financial crisis at that time”*

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<sup>23</sup> D. Bloomfield *Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), p. 153.

<sup>24</sup> K. kariuki [www.chromeextension://efaidnbmnnnibpcajpcqlclefindmkaj/http://kmco.co.ke/wpcontent/uploads/2019/04/Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-30th-April-2019.pdf](http://www.chromeextension://efaidnbmnnnibpcajpcqlclefindmkaj/http://kmco.co.ke/wpcontent/uploads/2019/04/Tribunals-within-the-Justice-System-in-Kenya-Integrating-Alternative-Dispute-Resolution-in-Conflict-Management-Kariuki-Muigua-30th-April-2019.pdf) accessed on the 7<sup>th</sup> of January 2024

<sup>25</sup> *Supra* Note 23

<sup>26</sup> [https://brill.com/view/journals/qjcl/12/3/article-p256\\_002.xml#fn0033](https://brill.com/view/journals/qjcl/12/3/article-p256_002.xml#fn0033) accessed on the 15 of February 2024

In addition to the above, **A. Nader**,<sup>27</sup> firmly argues that, it appears that having an independent tribunal that specialises in a specific field of settling company disputes has a positive impact on mitigating the effects of a financial crisis that may befall on a country.

**T. E. Carbonneau** <sup>28</sup> states that if the commercial sphere is to have a cost-effective way of resolving disputes, other means should be employed other than litigation as litigation not only requires huge sums of money to be spent, but also puts most companies into loss.

In the case of India, **Datar Arvind**<sup>29</sup> discusses the National Company Law Tribunal for India and undertakes a brief comparative analysis of administrative justice tribunals in selected jurisdictions, namely the United States of America, Jamaica, Canada and Australia. In the comparative analysis, Datar critically emphasises the need to have a company tribunal so as to effectively solve company disputes and regulate the smooth operations of companies in the commercial sphere.

## 1.8 METHODOLOGY

This study will make use of qualitative data collection techniques. The important Information will be gathered mainly through studying documentary sources such as journals, case law, Zambian legislation as well as scholarly works by other writers.

## 1.9 SCOPE

The scope of this study is the Zambian regulatory framework on company dispute resolution. Through this study, the author focuses on comparing the legal framework on

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<sup>27</sup>R. Nader, "Settlement of Disputes Under FIDIC Forms of Contract" in F. J. M. De Ly and P. A. Gelinas (eds.), *Dispute Prevention and Settlement Through Expert Determination and Dispute Boards: Dossiers of the ICC Institute of World Business Law* (Paris: International Chamber of Commerce, 2017) pp.87–96

<sup>28</sup>T. E. Carbonneau, *Cases and Material Arbitration Law and Practice* (Eagan Minnesota: West Academic Publishing, 2007) pp.24–25

<sup>29</sup>D. Arvind 'The Tribunalisation of Justice in India' 2006 *Acta Juridica* 288 available at

dispute resolution through tribunals in Australia and the Zambian dispute resolution through litigation and any other available means as per the law.

### **1.10 LIMITATION**

The time for field work was a limiting factor and affected primary data collection as the researcher is in full time employment. However, the researcher concentrated more on qualitative research and maximised on the time available for the research.

### **1.11 ETHICAL CONSIDERATIONS**

The researcher assured all persons giving information for this research that the information would solely be used for the purpose of the research and nothing else and further that their identity would not be revealed. In addition, the informants were assured that meetings and interviews, if any, would be held according to the informant's convenience and schedule.

### **1.12 OVERVIEW OF CHAPTERS**

Chapter one has provided the conceptual framework of this research paper. It has provided for the statement of the problem, the objectives of the study, research questions, the significance of the study, literature review, research methodology or research design, the scope of the study, limitations, and ethical considerations, are highlighted in this chapter. Chapter two is an examination of the available dispute resolution procedures in Zambia and their effectiveness in aiding economic growth of companies. Chapter three is a discussion of the litigation system of Zambia and its ineffectiveness on company dispute resolution. Chapter four is a discussion of the tribunal system best suited for Zambia's company disputes. Chapter five is a discussion of the use of mediation and other methods of ADR to settle company disputes and their disadvantages. And lastly, Chapter six is a summary of findings, conclusion and recommendations

## CHAPTER TWO

# AN EXAMINATION OF THE AVAILABLE DISPUTE RESOLUTION PROCEDURES IN ZAMBIA AND THEIR EFFECTIVENESS IN AIDING ECONOMIC GROWTH OF COMPANIES

## 2.0 INTRODUCTION

This chapter's main goal is to analyse and critically discuss Zambia's available dispute resolution procedures. This will be carried out with the sole purpose of determining whether or not the dispute resolution techniques currently in use are beneficially assisting commercial entities in resolving their conflicts without causing them harm.

## 2.1 THE BODY CONFERRED WITH THE AUTHORITY TO SETTLE DISPUTES IN ZAMBIA

Incontrovertibly, the judicial authority is vested in the Courts established pursuant to **Article 120 of the Constitution of Zambia**<sup>30</sup> and shall be exercised in accordance with the Constitution of Zambia and any other applicable law. This averment is as provided by **Article 118(1) of the Constitution of Zambia**<sup>31</sup> which provides that:

*“Judicial authority vests in the Courts and shall be exercised by the Courts in accordance with this Constitution and other laws”*

In light of the foregoing, the terminology judicial authority is further defined in **Article 266 of the Constitution of Zambia**<sup>32</sup> to mean “... power and rights to perform judicial functions. Further, judicial functions are also defined in **Article 266 of the Constitution of Zambia**<sup>33</sup> to imply “the functions of the Judiciary set out in this Constitution.”

Stemming from the above averment, the judicial functions that the Courts are vested with are as provided for in **Article 119(2) of the Constitution of Zambia**<sup>34</sup> as follows:

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<sup>30</sup> Act No,2 of 2016

<sup>31</sup> Act No,2 of 2016

<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid*

<sup>34</sup> *Ibid*

*“The Courts shall perform the following judicial functions: (a) Hear civil and criminal matters; and (b) hear matters relating to, and in respect of, this Constitution. (3) Except as otherwise provided in this constitution, other law or as ordered by a court, the proceedings of a court shall be in public.”*

The other laws to which the aforementioned constitutional provision alludes are pertinent statutes that support the courts' judicial functions and establish procedural guidelines. The aforementioned essentially means that a Court of Competent Jurisdiction should be consulted first in cases involving disputes between businesses. An exception to supra is where the parties made an agreement to settle their dispute through the Alternative Dispute Resolution process (hereinafter referred to as “ADR”). This initially is not admirable as most often, one party may only want to settle their dispute in a way that may cripple the other company.

## **2.2 PROMOTION OF ALTERNATIVE DISPUTE RESOLUTION BY THE CONSTITUTION OF ZAMBIA**

**Article 118(2) (d) of Constitution of Zambia<sup>35</sup>** states that:

*“Alternative forms of dispute resolution, including traditional dispute resolution mechanisms, shall be promoted, subject to clause (3);*

In light of the above, **Article 118(3) of Constitution of Zambia<sup>36</sup>** further provides as follows:

*“Traditional dispute resolution mechanisms shall not (a) contravene the Bill of Rights;  
(b) Be inconsistent with other provisions of this Constitution or other written law;  
or (c) be repugnant to justice and morality.”*

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<sup>35</sup> Act No. 2 of 2016

<sup>36</sup> Act No.2 of 2016

Incontrovertibly, Alternative Dispute Resolution is permissible by the Constitution aside from litigation that is in line with **Article 119(1) and (2) of the Constitution of Zambia.**<sup>37</sup>

ADR methods will apply as long as they do not violate the **Bill of Rights**<sup>38</sup>, **be inconsistent with the Constitution or other written law, or be inimical to justice and morality.** In such an instance, alternative forms of dispute resolution, including those mechanisms, shall be promoted.<sup>39</sup>

### **2.2.1 Alternative Dispute Resolution as a Mode of Dispute Resolution Used in Zambia**

Despite the Judicature being the main and primary means of dispute settlement for companies in dispute, in this jurisdiction, the court, in particular the High Court, has incorporated rules in its procedures to encourage parties to settle amicably using the court system. The modes discussed below are the ones through which companies can settle their disputes amicably.

### **2.2.2 Arbitration Agreements**

**The Arbitration Act**<sup>40</sup> governs the process of arbitration, while some of the rules are found in the High Court Act<sup>41</sup>.

According to **Section 2 of the Arbitration Act**<sup>42</sup>:

*“An arbitration agreement is any written or verbal agreement between parties to submit all or a subset of the disputes that have arisen or may arise between them regarding a specific legal relationship, whether or not such relationship is contractual.”*

As a result, not every agreement needs to be in writing, as long as there is proof of a contractual arrangement that subjects disagreements to arbitration.

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<sup>37</sup> Act No.2 of 2016

<sup>38</sup> Chapter 1 of the Laws of Zambia

<sup>39</sup> Supra Note 8

<sup>40</sup>No. 19 of 2000

<sup>41</sup> Chapter 27 of the laws of Zambia

<sup>42</sup> No. 19 of 2000

Further, the Arbitration Act specifies that if an arbitral agreement is written down, it needs to be included in a document that all parties have signed. Agreements that are further acknowledged in correspondence or other forms of communication that serve as proof of the agreement are acknowledged.

When an objection is possible but it is not raised in the written arbitration agreement, the right is deemed to have been waived. If the contract is in writing and the clause is included in the terms and conditions, it is also possible for an arbitration agreement to be included.

Pursuant to **Section 6 of the Arbitration Act**,<sup>43</sup> parties may arbitrate any agreement. This entails that in a country like a Zambia that lacks a specific company tribunal concerned with the settlement of company disputes only, companies can resort to use arbitration to settle their disputes amicably.

In light of the above, matters that cannot be arbitrated are:

*“agreements that go against public policy; a disagreement that cannot be arbitrated under any applicable law; criminal matters, unless specifically allowed by written law or with a judge's permission; Matrimonial cases; cases related to matrimonial cases, unless the court allows the matter to be decided through arbitration; issues pertaining to parentage, maternity, or paternity; and cases impacting the interests of a minor or person who is legally incapacitated, unless the minor or person is represented by a competent individual.”<sup>44</sup>*

### **2.2.3 Disadvantages of Arbitration on Companies**

The arbitration agreement is one of the best ways of dispute settlement for companies as it is less time and financially costly. Unfortunately, it is not a mandatory mode of resolving disputes in Zambia as it is only activated through consent of both parties.

A non-party to an arbitration agreement cannot be bound by its terms and outcomes, as per the Superior Court rulings in **Odys Oil Company Limited v. The Attorney General**

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<sup>43</sup> Act. No. 19 of 2000

<sup>44</sup>6(2)(c) of the Arbitration Act

**and Others**<sup>45</sup>; and **Vedanta Resources Holdings Limited v. ZCCM Investment Holdings Plc & Konkola Copper Mines Plc**<sup>46</sup>. In this sense, an arbitration agreement cannot be enforced against a third party under any circumstances.

This entails that all the companies would have to enter into one arbitration agreement if they are all to resort to solving their disputes through arbitration. In the absence of the agreement, a company is at liberty to commence legal proceedings which in most cases are not favourable to companies that are just starting up as they will now be required to spend huge sums of money in order to battle it out in court with a big company.

Sometimes, big companies might be using litigation to threaten small entities which may be viable but a threat to them because they will be lacking financial muscle to sustain lengthy court cases.

Further, a disadvantage that arbitration has on companies is as can be construed from the case of **Beza Consulting Inc Limited v. Bari Zambia Limited & Another**.<sup>47</sup> The Court of Appeal provided guidance on the status of a third party to arbitral proceedings, ruling that third parties cannot be joined to arbitral proceedings and must file a Court action in order to be heard on an incidental matter.

Unlike in litigation, a defendant party to an arbitration cannot apply before the arbitrators that a third party who is not a party to the arbitration agreement contributed to the damages suffered by the other party to the arbitration and thus should be added.

The above is because arbitration is that of contractual agreements which are regulated by all the principles of contracts most especially, the principle of privity of contract as per **Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd**.<sup>48</sup>

In view of the forgoing, the best way to settle disputes amicably would be to establish a companies tribunal which will solely be vested with the duty to settle company disputes

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<sup>45</sup> (2012) ZR 164 Volume 1

<sup>46</sup> (Appeal No. 181/2019).

<sup>47</sup> (Appeal No. 171/2019),

<sup>48</sup> (1915) UKHL 1 (26 April 1915) AC 847

of all companies. This should be one with the characteristics of an arbitration tribunal, only that its decisions shall bind all companies as is the case with the Courts of Law.

### 2.3 MEDIATION

The Latin word "mediare," which means "to be in the middle," is where the word "mediate" originates. Generally speaking, it makes sense to enlist the aid of a third party to promote communication and ultimately look for a solution when parties to a dispute are unable to resolve their differences through talks and negotiations.<sup>49</sup>

As per the case of **Bank of Zambia and Richard Nyambe, Jackson Madimusa, Friday Mwale and Ferdinard Chipota**<sup>50</sup> mediation was stated to imply as follows:

*“The mediation conducted in the High Court and the Industrial Relations Court is Court Annexed Mediation; meaning it is part of the judicial system. Mediation is basically a process for resolving disputes, helping prevent disputes in the future, and mitigating the negative effects of disputes. Mediation has the benefit that it provides the greatest degree of party control over the process and over the outcome.”*

This is a good way of settling disputes between companies as the two parties to a dispute will have to come to a consensus. This in turn keeps the relationship between the companies to even collaborate in the near future on economic projects that can grow the corporate entities.

### 2.4 DISADVANTAGES OF MEDIATION

There are a few drawbacks to mediation that are present. First and foremost, in most cases, mediation does not reveal the whole truth about a problem. However, this is not possible in mediation; instead, in a court case, lawyers will be able to gather evidence

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<sup>49</sup><https://open.uct.ac.za/items/275d796e-3288-4dc0-9374-ef1508cb06aa> accessed on the 27<sup>th</sup> of March at 21:25 CAT

<sup>50</sup>SCZ NO. 30/2006APPEAL NO. 190/2005

and call witnesses. This therefore makes them not to be favourable means of resolving disputes between companies.

Big companies may prejudice a small company during the whole process of resolving the dispute as they might hide a number of useful information that will aid and speed up the settlement. More especially when the information is against them. This thus makes them less effective to help settle company dispute.

In addition, courts are designed to ensure equitable treatment for all parties involved in a case. However, the challenge still remains, which is, that they are financially costly and may affect the growth and operation of companies in the commercial world. While achieving equitable treatment is a goal in mediation as well, there are situations in which it can be challenging.

#### **2.4.1 It Can Be Unfair**

While it is desired that the mediating attorney will make every effort to guarantee a fair resolution for all parties, this cannot always be guaranteed. The result might also not be equitable if one party has greater mediation experience or is able to deceive the other party with purpose.

#### **2.4.2 Hidden Truths**

It should always be borne in mind that in a mediation process, not everything that is true might come to light. While lawyers can summon witnesses and subpoena documents and evidence in courtroom litigation, mediation lacks this kind of mechanism. If people choose to conceal information, it can be simple to do so, and you don't have many tools at your disposal to stop them. To successfully navigate mediation with the other party in your case, you must have their trust.

In most instances a party may need to proceed with courtroom litigation in the event that mediation does not result in a resolution. If this does occur, their case is compromised as they would have presented their case and arguments during the mediation. This

implies that their adversary would be more prepared and aware of what to anticipate from them. Therefore, following mediation, you might find that courtroom litigation may become more challenging than if you had just proceeded without mediation.

Most importantly, the following are the serious disadvantages:

- (a) there are issues with a mediation agreement's enforceability;
- (b) since the outcome is not assured, all parties must consent to a resolution, this can even be more challenging if information is being withheld by one or both parties;
- (c) a requirement for public disclosure by one of the parties may make mediation inappropriate;
- (d) using an inexperienced mediator can result in a resolution that is not beneficial;
- (e) the entire process may be a waste of time, money, and effort if one or both parties are unwilling to cooperate;
- (f) the mediation fee will have been wasted if the conflict cannot be settled there;
- (g) anytime during the mediation process, either party may decide not to continue; and
- (h) during the mediation process, it's possible that information that could be advantageous to one party could be revealed to the other.

Because of the above, ADR, the only means of resolving disputes that seems favourable to the growth of corporate entities in the commercial environment is not favourable as well. Further, the current litigation system is not favourable to the growth of commercial entities especially the new entrants.

## **2.5 CONCLUSION**

In summation, this chapter examined the available modes of resolving disputes that is available for companies. It has discussed the two major modes of ADR being mediation and arbitration. It has established that they are not effective thus a more effective companies tribunal should be established to help curb the legal status quo.

## CHAPTER THREE

### A DISCUSSION OF THE LITIGATION SYSTEM OF ZAMBIA AND ITS INEFFECTIVENESS ON COMPANY DISPUTE RESOLUTION

#### 3.0 INTRODUCTION

In Zambia, litigation has long been the go-to process for resolving disputes. Litigation continues to be a key component of conflict resolution today. On the other hand, advances in ADR on a global scale have demonstrated how detrimental it is for businesses and the public sector to quickly rely on litigation to settle disputes, particularly those involving corporations. ADR as has been demonstrated in Chapter Two has its own disadvantages which are not beneficial to companies. The author analyses Zambia's litigation system and its drawbacks in this chapter in an effort to resolve disputes between companies in an easy, cheaper and economically beneficial way.

#### 3.1 A DISCOURSE OF THE LITIGATION SYSTEM OF RESOLVING COMPANY DISPUTES IN ZAMBIA

The Zambian Courts are vested with the authority to hear disputes between companies in Zambia. This is through a system known as litigation.<sup>51</sup> Most companies do not prefer to have their matters resolved through litigation because of the lengthy and costly process that it takes. However due to the country not having at present, any company tribunal, they have no option but to resolve their matters either through litigation or ADR both of which are not economic both in time and resources and clearly not beneficial to all parties involved.

##### 3.1.1 Problems of Litigations in Local Courts

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<sup>51</sup><https://burlingtonslegal.com/news/what-is-litigation-all-you-need-to-know-about-the-law-process/> accessed on the 7<sup>th</sup> of April 2024 at 23:19 CAT

Despite their generally favourable characteristics, local courts have had some drawbacks. Although they are present throughout the nation, the majority of local courts are situated far from densely populated areas, discouraging some would-be users from making the lengthy trip. This becomes a challenge for upcoming commercial entities, when they are faced with commercial disputes which the local court has jurisdiction over.

Furthermore, local court Justices are overworked due to their heavy caseloads, which has raised doubts about the calibre of decisions these courts render. Therefore, if their decisions are legally questionable and not sober, they may prolong the finality of the dispute as the parties will keep on appealing. This is more so that they are not bound by the doctrine of stare decisis, their decisions do not bind them and other local courts, this leads to different rulings or judgments for the same facts.

In view of the above, if companies that are just coming up have their matters commenced before these Courts, there is a possibility that they will be affected by the aforementioned problems.

Another reason that makes the process lengthy is that most local court buildings are in a state of disrepair; this is in addition to there being a severe shortage of courtrooms.<sup>52</sup> A frequent issue in local courts that engenders adjournments is a lack of stationery, inadequate pay and working conditions, a dearth of housing problems, a shortage of staff, insufficient funding for court employees to attend seminars and training sessions, a lack of library resources, and a shortage of important statutes and legal texts are

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<sup>52</sup>*chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://www.judiciaryzambia.com/wp-content/uploads/2020/10/The-Judiciary-of-Zambia-Annual-Report-2017-1.pdf accessed on the 7<sup>th</sup> of March 2024 at 01:23 CAT*

additional barriers facing local courts.<sup>53</sup> These situations are a big constraint on effecting justice and resolving disputes between commercial entities.

An added issue that local courts grapple with is transportation.<sup>54</sup> Because of this, the majority of local court Justices use public transport to work. This puts the Justices' safety in jeopardy.

The lack of formal training for local court Justices exacerbates the problem. Thus, this reinforces the widespread belief that local court Justices administer their own particular brand of justice that differs from that which is upheld by higher courts in a setting already rife with doubts about the validity and fairness of their decisions.

### **3.1.2 Problems of Litigations in Subordinate Courts**

Due to the absence of enough courtrooms, Magistrates have to wait for their fellow magistrates to finish using the few courtrooms that are available before they can use them themselves.<sup>55</sup> As a result, there will inevitably be delays in the administration of justice. This in turn increases the possibility of the matter not ending within a short period of time and makes commercial entities to spend more on litigation.

In addition to the above, Advocates have frequently complained about arriving at court as early as 08:00 hours and having to wait until midday or later for their cases to be called, only to have the Magistrate move the hearings to later dates and times. This is a huge hindrance to commercial disputes being resolved expeditiously. Especially that,

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<sup>53</sup>[https://www.google.com/search?q=LACK+OF+STATIONARY+IN+COURTS+OF+ZAMBIA&rlz=1C1CHZO\\_enZM908ZM908&oq=LACK+OF+STATIONARY+IN+COURTS+OF+ZAMBIA&aqs=chrome..69i57j33i160l3.56140j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=LACK+OF+STATIONARY+IN+COURTS+OF+ZAMBIA&rlz=1C1CHZO_enZM908ZM908&oq=LACK+OF+STATIONARY+IN+COURTS+OF+ZAMBIA&aqs=chrome..69i57j33i160l3.56140j0j7&sourceid=chrome&ie=UTF-8) accessed on the 7<sup>th</sup> of March 2024 at 01:23 CAT

<sup>54</sup>Ndulo, Muna (2013) "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System," *Zambia Social Science Journal*: Vol. 2: No. 1, Article 3. Available at: <http://scholarship.law.cornell.edu/zssj/vol2/iss1/3>

<sup>55</sup> *Supra* Note 3

matters of business in nature to which the subordinate Court has jurisdiction over, may be delayed at a great cost to small commercial entities.

It is worth noting that the High Court's infrastructure has not changed much since it was constructed during the colonial era,<sup>56</sup> but the population it serves has expanded exponentially. The Court is currently extremely congested as a result of this. The sheer volume of cases that are filed in the High Court every day is greater than the number of Judges. Furthermore, to initiate proceedings in the commercial court is very expensive, and this does really take a huge cost on commercial entities especially those that are just starting up as companies. The amount they would pay to file an application in court to either defend or commence an action against another company may cripple their finances or greatly make a dent on their profitability.

Another difficulty with litigation is that some Judges lack specialised knowledge or experience in research and struggle to render their written decisions. Other Judges lack computer and cyber literacy and are unable to use the internet for research. As a result of the erroneous concern that other Judges might be aware of their limitations and this might make them look inadequate, it has resulted in a lack of collaboration amongst Judges.

### **3.1.3 High Court Commercial Actions**

First and foremost, it is paramount to define the term commercial action. The terminology is defined in **Order 53 Rule 1 of the High Court (Amendment) Rules, 2012<sup>57</sup>** as:

***“Commercial action ” means any cause arising out of any transaction relating to commerce, trade, industry or any action of a business nature.”***

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<sup>56</sup>Ndulo, Muna (2013) "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System," *Zambia Social Science Journal*: Vol. 2: No. 1, Article 3. Available at: <http://scholarship.law.cornell.edu/zssj/vol2/iss1/3>

<sup>57</sup>SI No. 27 OF 2012

From the above, it can be observed that any cause arising out of any transaction relating to commerce, trade, industry or any action of a business nature lies in the Commercial Court. The Commercial Court is a division of the High Court for Zambia as per **Article 133 (2) of the Constitution of Zambia**<sup>58</sup> which stipulates that:

***“(2) There are established, as divisions of the High Court, the Industrial Relations Court, Commercial Court, Family Court and Children’s Court.”***

The above averment, was further traversed in the case of **Kawambwa Tea Co. (1996) Ltd. v Zygo Bonsai Ltd**<sup>59</sup> which was an appeal case of a matter from the Commercial Court.

### **3.1.4 Lengthy Proceedings at the Commercial Court**

Commencement of an action before the court is usually through filing of an application as provided for in **Order 53 Rule 5 of the High Court (Amendment) Rules, 2012**.<sup>60</sup> The cost of filing the said application is expensive and not beneficial to commercial entities especially the upcoming ones. Additionally, the commencement of actions in the commercial court and their subsequent proceedings are lengthy and may require a number of costly interlocutory applications too. For example, after the costly commencement process, what follows is the scheduling conference.<sup>61</sup> Parties are required to give the Judge an estimate of the time the hearing will take and the Judge allocates such time to the matter. Mostly, because the courts only have few Judges who are tasked to hear all forms of matters, dates tend to be influenced by how free the Judges calendar is. If it’s occupied, during the scheduling conference, the Judge may not be inclined to a date that suits the parties but his or herself.

Therefore, having tribunals with Judges solely focused on commercial disputes would free up more dates and thus making matters being determined within a reasonable time.

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<sup>58</sup> Act No.2 of 2016

<sup>59</sup> SCZ Appeal No. 11 of 2003

<sup>60</sup>S.I No. 27 of 2012

<sup>61</sup> Order 53 Rule 7 of the High Court (Amendment) Rules, 2012

The lengthy time it takes for matters to be determined is usually because by law and procedure the presiding Judge is at liberty to grant an adjournment<sup>62</sup> to any party even if the Judge is of the opinion that the grounds are not very firm. He may only compensate this by awarding the opposing party costs and condemn the party requesting for the adjournment to a hearing fee to be paid before the matter proceeds.<sup>63</sup> If an application is struck off for non-attendance by the applicant, the application to restore is charged higher fees than normally charged.<sup>64</sup> Any party that neglects to serve process which results in an adjournment, is condemned to pay hearing fees before the matter proceeds.<sup>65</sup>

The above in themselves make the whole process of resolving disputes complicated and it may seem never ending for commercial entities. This is because most often, matters are struck off for non-attendance because the lawyers have not attended court on behalf of the client for various reasons even delays in paying legal fees. This then entails that even if a financially weaker commercial entity had a strong case, it may lose the case for none attendance by its lawyers.

In an interlocutory application, the applicant must file, together with the application, skeleton arguments of his/her case stating the facts relied upon, the law and citing any authorities relied upon with copies of such authorities wherever possible.<sup>66</sup> The respondent does the same, *mutatis mutandis*, when filing his/her affidavit in opposition to the application. This practice also applies to applications for assessment of damages. If sixty days elapse without any progress in the case, the matter is taken to the Judge for dismissal. In the unlikely event of a party desiring to vary a date of hearing, he/she makes an application by notice at least ten days before the date of hearing.

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<sup>62</sup> Order 53 Rule 9 of the High Court (Amendment) Rules, 2012

<sup>63</sup> *Practice Direction No.5.*

<sup>64</sup> Order 53 Rule 10(2) of the High Court (Amendment) Rules, 2012

<sup>65</sup> Order 53 Rule 9(2) of the High Court (Amendment) Rules, 2012

<sup>66</sup> Order 53 Rule 5 and 6 of the High Court (Amendment) Rules, 2012

It is clear that despite the rules which apply to commercial actions above having had been designed with the aim of speeding up proceedings, Judges dealing with commercial actions by applying them strictly, inadvertently, makes it difficult and costly for commercial entities, especially small ones.

Library facilities in the higher courts, though better than in the lower courts, are still insufficient and need updating. Salaries and conditions of service for the superior court's judges are better than those obtaining in the lower courts but they are still low when compared to those obtaining in the region. In addition to the dissatisfaction with salaries and other conditions of service, the Supreme Court has also found itself with a much bigger workload due to the many appeals coming before it. This could be attributed to the increase in awareness of human rights by members of the society and the fact that they can pursue their cases up to Supreme Court level.

### **3.1.5 Lack of Independence**

An independent judiciary is a critical element of any democratic society. Additionally, an independent and honourable judiciary is indispensable to justice in any society that practices the rule of law such as Zambia. However, it is difficult for the judiciary to be independent and impartial when it is faced with so many serious constraints. Judges and other judicial personnel do not operate in a vacuum. Like other members of society, they are also shaped by the society they live in. As William W. Schwarzer put it:

***“Even under optimum conditions, political and societal pressures will exert some influence on judges. Popular sentiment, government policies, political debate, media activity, and social conditions, such as poverty, discrimination, disease, all shape the environment in which judges work and live.”<sup>67</sup>***

It is clear from the above that despite the good intentions of the judiciary to be impartial they sometimes find themselves operating under a difficult environment.

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<sup>67</sup> Director, U.S. Federal Judicial Center in an article entitled “Judicial Independence and Judicial Training” Jan. 1991.

In Africa there have always been lingering claims of political meddling and intimidation of the judiciary, as well as partiality towards the ruling party especially in politically charged cases. In Zambia, it has been claimed that political intimidation of the judiciary dates back to the days of the United National Independence Party (UNIP) era. An example is given of when the High Court overturned the lower court's sentences imposed on two Portuguese soldiers.<sup>68</sup>In this instance the Chief Justice (a white man) had his chambers broken into by young people who accused him of racism, prompting the President of the Republic then, Dr. Kenneth David Kaunda, to publicly denounce the judgment. Consequently, the Chief Justice and two other white judges resigned and fled the nation for fear of their lives.

Under the Movement for Multi Party Democracy (MMD) government former President Frederick Chiluba's administration the Supreme Court passed a judgment in the case of **Mulundika and Others v. The People**,<sup>69</sup> in which sections 5 and 7 of the Public Order Act were struck off as being unconstitutional. Kenneth Kaunda, Zambia Democratic Congress President Dean Mung'omba and many others were detained and charged as being conspirators in the coup d'état attempt of October 27, 1997 only to have the charges dropped. Due to the political tensions that existed at the time it was alleged that; the government of the day was trying to use the courts to settle political scores.

Former President Edgar Lungu when he was President under the Patriotic Front (PF) era in 2017 issued threats to the Constitutional Court that they would plunge the nation into chaos if they passed a judgment that he was not eligible to stand for re-election in 2021. "LUSAKA (Reuters) - Zambian President Edgar Lungu has warned constitutional court judges not to stop him running for another term in office, state media reported, drawing a rebuke from a top legal body. Lungu told supporters on Thursday the judges could plunge the southern African country into chaos if they made any "adventurous"

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<sup>68</sup> *In the case of Silva and Freitas v. The People (1969) Z.R. 121.*

<sup>69</sup> *1995/SCZ/25 (unreported).*

rulings, the Zambia Daily Mail and Times of Zambia reported."<sup>70</sup> This was a case in which the question of the eligibility of Lungu to stand for re-election in 2021 was before the Court. The Law Association of Zambia was quick to condemn the threats. The Law Association of Zambia asked Lungu on Friday to withdraw his warning saying it served "to undermine the authority of the judiciary and erode public confidence in the institution."<sup>71</sup>

With noted political intimidation it is doubtful if the judiciary in Zambia is truly free to pass judgments without fear, favour or undue influence, in keeping with genuine judicial independence. However, some quarters believe that despite political intimidation and interference in the operations of the judiciary, courts have continued to act independently and at times made judgments and rulings critical of the government.<sup>72</sup>

Lastly, it can be added that there is a compounding factor of the busy schedules of all Judges which makes litigation non-favourable for commercial dispute settlements. They (Judges) just do not have the time and capacity to ensure speedy deliveries of judgments even against their best intentions.

### 3.2 CONCLUSION

This chapter has demonstrated that litigation is not the best mode of resolving disputes between commercial entities. This is because it is characterised by lengthy, costly, and in some instances perceived biased results, inter alia. Therefore, to have the results best suited for companies, it is submitted that a Companies Tribunal is a must.

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<sup>70</sup><https://www.reuters.com/article/idUSKBN1D323H/>

<sup>71</sup><https://www.reuters.com/article/idUSKBN1D323H/>

<sup>72</sup> Zambia – Country Reports on Human Rights Practices 2003, *id. n 6 supra*. <sup>56</sup> *Id. n 6 above.*

## CHAPTER FOUR

### A DISCUSSION OF THE TRIBUNAL SYSTEM BEST SUITED FOR ZAMBIA'S COMPANY DISPUTES

#### 4.0 INTRODUCTION

The core purpose of this chapter is to concisely and eloquently discuss the tribunal systems with reference to how the South African Jurisdiction has conceptualised it. This is done with the purpose of borrowing from that jurisdiction's concept, a beneficial tribunal system that Zambia can adopt for company disputes.

#### 4.1 GENERAL OVERVIEW AND CONCEPT OF TRIBUNALS

Tribunals are administrative because they are a body that exercises public power. Tribunals regulate and protect the welfare<sup>73</sup> and socio-economic<sup>74</sup> rights of their users. Each tribunal consists of a panel of members with expertise to deliberate on the disputes or matters before it. Tribunals are less formal than courts and operate in an expedited manner to dispense with matters. Tribunals improve access to justice by being a body to resolve disputes, which are regulated by legislation. Legislation pronounces on exclusive jurisdiction;<sup>75</sup> in certain instances, tribunals enjoy concurrent jurisdiction with the courts.<sup>76</sup> However, the concurrent jurisdiction is a problem because this means that people have the choice of either going to court or to a tribunal to have their dispute determined. It is therefore desirable to eliminate the choice, thereby creating an environment where all cases are heard by tribunals. This is achieved when exclusive jurisdiction is granted to a unified tribunal system. Accordingly, legislation would need to be amended or created to facilitate for the exclusive jurisdiction granted

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<sup>73</sup> Jeanne Bret, "Altitudinal Structuring, ADR, and Negotiation Strategy" (2005) 31 *Journals of Negotiation*.

<sup>74</sup> Sandra Hale, "Approaching The Bench: Teach the Magistrate and the Judge How to work with interpreters (2015) 163-180s

<sup>75</sup> John Gichuhi, "Revisiting Article 159 (2) (c) of Kenyan Constitution: How the Judge sees it" (2018) *SSRN Electronic journal*

<sup>76</sup> Anthony Faber "A theory of justice Reexamined" (2012) *SSRN Electronic Journal*

to tribunals. Tribunals improve administrative justice, as tribunal members deliver decisions that are binding and enforceable.<sup>77</sup>

As a result, the characteristics and functions of tribunals promote access to justice. It is apparent that tribunals and courts are distinguishable from one another in many respects, and this is elucidated by the *sui generis* nature of tribunals, amongst other aspects previously mentioned, which will be fully discussed in this chapter.

Currently, each tribunal develops and functions independently from the others, which is not ideal, as a unified tribunal system is more favourable. An amalgamated tribunal system is not the best and thus when developing one, it is advisable to establish a company tribunal that is separate and concentrates on commercial disputes only. This tribunal can be one that supports the current functioning and existing Commercial Actions Court<sup>78</sup>.

If a unified tribunal system is established, it may prevent the individual tribunals from operating with different sets of rules that duplicate each other.<sup>79</sup> Tribunals do not create a binding precedent, as each decision is decided on a case-by-case basis, and previous decisions are not followed.<sup>80</sup> As a result, there is no principle of *stare decisis* of the tribunal.<sup>81</sup> Despite this, the decisions by tribunals refer to both the rules of the High Court and case law decisions when deliberating upon a decision.<sup>82</sup>

A tribunal delivers written reasons when rendering its ruling and or judgement. The rules of evidence that govern tribunals are regulated by the rules of the tribunals read with the rules of court, which are also applied. The establishment of a tribunal system to settle commercial disputes would spearhead all procedures and precedents under one

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<sup>77</sup> Gaynor, Tia sheree, and Hindy Lauer Schachter. 2014." Revisiting the Theory of Justice." Public Administration Quarterly 38 (4):440-444

<sup>78</sup> Order 53 of the High Court (Amendment) Act 2012

<sup>79</sup> Supra note 1

<sup>80</sup> Ibid

<sup>81</sup> Ibid

<sup>82</sup> Ibid

system of operation which will be favourable to the growth of the commercial industry in Zambia.

## **4.2 THE CHARACTERISTICS OF A TRIBUNAL**

For the purposes of this thesis, it is important to briefly engage with the elements of administrative action, because the decisions of tribunals constitute administrative action. In view of the forgoing, the following are the elements of an administrative action, namely a Tribunal, as has been eloquently described in the South African Jurisdiction.

### **4.2.1 A Decision**

The South African legislature chose a definition that entailed the characteristics of administrative action, and was borrowed from the Australian Administrative Decision (Judicial Review) Act of 1977 (ADJR).<sup>83</sup>This means that, a decision entails:

***“Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-***

- a) making, suspending, revoking or refusing to make an order, award or determination;***
- b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;***
- c) issuing, suspending, revoking or refusing to issue a license, authority or other instrument;***
- d) imposing a condition or restriction;***
- e) making a declaration, demand or requirement;***
- f) retaining, or refusing to deliver up, an article; or***
- g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.”***

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<sup>83</sup>Administrative law in South Africa (2012) 198.

The abovementioned elements were discussed in the case of *Bhugwan v JSE Ltd*,<sup>84</sup> where Claassen approved the steps to be followed as:

- i) ***except where an authority acts of its own accord, a final application, request or claim must have been addressed to the authority to exercise its public power in relation to a set of factual circumstances applicable to the subject;***
- ii) ***all relevant information must have been gathered and placed before the authority;***
- iii) ***there must have been an evaluative process in which the information was considered;***
- iv) ***a conclusion must have been reached by the authority as to how its powers should be exercised; and***
- v) ***there must have been an exercise of the power based on the conclusion reached.***
- vi)

Irrespective of this proposed list, Claassen recognised that the list is not applicable verbatim to each and every case, and that each case is considered on its own merit, hence it can be seen as a guideline.<sup>85</sup>

#### **4.2.2 By An Organ of the State**

An organ of the state performs administrative action in terms of the Constitution or any other written legislation.<sup>86</sup> It is relevant to highlight that the organ of state exercises any power in terms of the Constitution.<sup>87</sup> In exercising power in terms of legislation, it is limited to public power and functions.<sup>88</sup>

#### **4.2.3 When Exercising A Public Power**

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<sup>84</sup>*Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) para 10.

<sup>85</sup>*Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) para 11.

<sup>86</sup> C Hoexter *Administrative law in South Africa* (2012) 206.

<sup>87</sup>*ibid*

<sup>88</sup>*ibid*

In terms of the *Calibre Clinical Consultants*<sup>89</sup> decision, all relevant factors were considered in determining whether there is an exercise of public power, such as public funding, regulating committee, and is not limited to whether the annual report is tabled in Parliament to mention a few factors.

#### **4.2.4 In Terms of Any Legislation, or in Terms of an Empowering Provision**

The reference is to any legislation and, in terms of the FIFA<sup>90</sup> decision, also entails the exercise of public power.

#### **4.2.5 That Adversely Affects Rights**

The verb 'affects' refers to 'determining rights or taking away or abolishing rights.'<sup>91</sup> The rights that are adversely affected are the rights to administrative justice, meaning lawful, reasonable and procedurally fair administrative action, as well as the right to reason.<sup>92</sup>

#### **4.2.6 That Has Direct External Legal Effect**

The reference to directness amounts to finality.<sup>93</sup> The external consequence is the reference to the 'public impact'.<sup>94</sup> The legal effect means the immediate, final and binding effect, which overlaps with the concept of directness.<sup>95</sup>

#### **4.2.7 That is not Specifically Excluded by the List of Exclusions**

The list of exclusions is not completely unreviewable due to the principle of legality.<sup>96</sup> The list of exclusions is as follows: executive powers and functions, national executive, provincial executive, executive powers and functions of a municipal council,

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<sup>89</sup>*Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) 47 & 61. Referred to as the Calibre Clinical Consultants.

<sup>90</sup>*M & M Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd* 2011 (5) SA 163 (GSJ) 324.

<sup>91</sup> C Hoexter *Administrative law in South Africa* (2012) 221.

<sup>92</sup> *Ibid* (2012) 224.

<sup>93</sup> *Ibid* (2012) 231.

<sup>94</sup> *Ibid* (2012) 234.

<sup>95</sup> *Ibid* (2012) 234.

<sup>96</sup> *Ibid* (2012) 235.

legislative functions, judicial functions, decisions to institute or continue a prosecution, and decisions of the judicial service commission.

Thereafter, it is necessary to engage with tribunal decisions that were taken on judicial review on the basis that the decision amounted to administrative action.

In the ruling of ***Fikile Vusi Jele and 18 Others v Young Ming Shan CC*** of 8 May 2013, a decision was taken on review to the High Court.<sup>97</sup> The review judgment is important, as the court held that the decision of the tribunal was administrative action.

The Tribunal used the decision of the Constitutional Court, which confirmed the Rental Housing Tribunal's power to declare some provisions of lease agreements an unfair practice, as the service charge levied was in terms of a clause contained in the lease agreement.<sup>98</sup> The abovementioned decision was taken on review and the functions of the Rental Housing Tribunal were discussed at length. It was stated:

***“The Tribunal is, nevertheless, a state organ exercising public power. Its functions are essentially administrative in nature and its proceedings are expressly made reviewable and its rulings are not appealable. It is appropriate that the Rental Housing Tribunal be held to the standards espoused by the Constitution in section 33, namely, lawfulness, reasonableness and procedural fairness. When all facts and circumstances are taken into account its function, including those of an adjudicative nature, constitute ‘administrative action’ as contemplated by section 33 of the Constitution.<sup>99</sup> PAJA does not exclude the proceedings and functions [sic] [functions] of the Rental Tribunal established in terms of***

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<sup>97</sup>*Young Ming Shan CC v Ajay Chagan NO & Fikile Vusi Jele and 80 Others* Case no: 26148/2013 Gauteng Local Division, Johannesburg (the court name previously referred to has subsequently changed to the Gauteng Division, Johannesburg).

<sup>98</sup>*Fikile Vusi Jele and 18 Others v Young Ming Shan CC* RT 909/12 (Gauteng Rental Housing Tribunal, Johannesburg) para 76 p 21.

<sup>99</sup> 26148/2013 Gauteng Local Division, Johannesburg (the court name previously referred to has subsequently changed to the Gauteng Division, Johannesburg) para 45 p 26.

***the Act. Since PAJA is the legislation contemplated to give effect to the rights contemplated in section 33 of the Constitution, it is applicable to the proceedings of the Rental Tribunal.***<sup>100</sup>

#### **4.3 IMPORTANCE OF A TRIBUNAL AS VIEWED IN THE EYES OF COMMERCIAL ENTITIES**

Companies Tribunals are important to the growth of commercial entities for a number of progressive reasons. Among a plethora of reasons, Tribunals are important because tribunals present the following effects. Firstly, the right of access to a tribunal is addressed by the establishment of the tribunal as a forum to hear disputes. Secondly, tribunals are seen and established to embody the attributes of impartiality and independence. Lastly, the due process guarantee is fulfilled, as tribunals create a platform for a fair hearing that is also a public hearing, as the public have the option of attending the hearing. The decisions of tribunals are published by the media and by the tribunal in the decision database on their respective websites. In order for access to the right to be established, the threshold of enquiry must be satisfied, namely 'that there must be a dispute capable of resolution by law'.<sup>101</sup>

It is in view of the above that tribunals are a best system that Zambia should consider establishing as a default means and first instance means of resolving disputes between companies. An option of appealing to the commercial court division of the High Court<sup>102</sup> can be enshrined in the governing Act of the Tribunal once established.

#### **4.4 CONCLUSION**

As has been eloquently submitted in this chapter, establishing a tribunal will be beneficial to the growth of the commercial environment as tribunals guarantee; a forum to hear disputes, tribunals are seen and established to embody the attributes of impartiality and independence, and the due process guarantee is fulfilled. Therefore, a proposed tribunal for Zambia is one that has the elements as defined in South Africa.

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<sup>100</sup> 26148/2013 Gauteng Local Division, Johannesburg para 46 p 26.

<sup>101</sup> K Iles 'Access to courts' in I Currie & J de Waal (eds) *The Bill of Rights handbook* (2013) 711.

<sup>102</sup> Article 120(2) of the Constitution of Zambia Act No.2 of 2016

## CHAPTER FIVE

### A DISCUSSION OF THE USE OF MEDIATION AND OTHER METHODS OF ADR TO SETTLE COMPANY DISPUTES AND THEIR DISADVANTAGES

#### 5.0 INTRODUCTION

The core purpose of this chapter is to critically discuss ADR as it is employed in other jurisdiction. It further aims to examine the effects mediation and ADR has on the growth of ADR. In the process, it will discuss how Uganda applies ADR and mediation to settle commercial disputes.

#### 5.1 THE CHRONICLES OF THE CONCEPT OF ADR AND THE SETTLEMENT OF COMPANY DISPUTES

Once a dispute arises, the main issue is how to manage or resolve it. Historically, various methods of dispute resolution mechanisms have been put to use by different societies. Every society has had its own methods of resolving disputes for it is impossible for a society and commercial entities to develop without effective dispute settlement mechanisms.

Alternative Disputes Resolution describes all those conflict resolution processes other than including but not limited to negotiation, commission of inquiry, mediation, conciliation, expert determination, arbitration and others.<sup>103</sup> Commentators have widely faulted the expression alternative dispute resolution proffering that it implies these mechanisms are second best to litigation.<sup>104</sup>

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<sup>103</sup>Jethro K. Lieberman & James F. Henry (1986). 'Lessons from the Alternative Dispute Resolution Movement.' 53 *University of Chicago Law Review* at p. 424.

<sup>104</sup> Clare Manuel, Richard Hooper, justice Ben Odoki auspices of the department for international development (uk) and private sector foundation Uganda 23, July 1999.

ADR is a stand-alone enterprise whose functionality is not alternative to other dispute resolution mechanism and whose existence predates litigation.<sup>105</sup> Justice **Geoffrey W.M Kiryabwire**, avers that:

***"ADR is a structured negotiation process whereby the parties to the dispute themselves negotiate their own settlement with the help of an independent intermediary who is neutral and trained in techniques of ADR."***<sup>106</sup>

ADR is not just an alternative to the court system. But it is a complementary to the court system. Hence, it is difficult to look at ADR simply as alternative mechanisms, for they are the principal mechanisms of dispute settlement.

ADR predates litigation and its known history dates back to 4000 BC. It is believed that in ancient Greek and Egypt, it was widely in use.<sup>107</sup> The three, Abrahamic religions"; Judaism, Christianity and Islam also encourage ADR mechanisms in different forms.<sup>108</sup> In the ancient time, different ADR mechanisms were used by the community in an informal manner. However, those informal ADR mechanisms share some procedural features with the current and modern ADR mechanisms. With the advent of civilization and complexity of human life, however; the court system tried to overrule ADR mechanisms and they began to be seen as "an unlawful attempt to oust the courts from their jurisdiction." Modern society has however decided to allow for ADR as a mode. The most important and worrying question is, is ADR useful to effectively resolve disputes between companies and support their growth.

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<sup>105</sup> *Ibid*

<sup>106</sup> Jerome T. Barrett, & Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement*, HB Printing, USA, 2004

<sup>107</sup> Jerome T. Barrett, & Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement*, HB Printing, USA, 2004

<sup>108</sup> Jerome T. Barrett, & Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement*, HB Printing, USA, 2004

## 5.2 TYPES AND CLASSIFICATIONS OF ADR MECHANISMS

The term ADR encompasses various mechanisms which are different in many ways. It means:

***"ADR is an umbrella term for a variety of processes which differ in form and application.***

***Differences include: levels of formality, the presence of lawyers and other parties, the role of the third party (for example, the mediator) and the legal status of any agreement recalled."***<sup>109</sup>

Therefore, different jurisdictions recognise different types of ADR mechanisms according to their respective needs.

## 5.3 THE LAW GOVERNING ALTERNATIVE DISPUTE RESOLUTION IN UGANDA

The Ugandan court systems have, of late, progressed and become more appreciative of the global commercial developments and therefore bringing about the establishment of other dispute resolution mechanisms in the administration of justice that are faster, efficient and accessible.

### 5.3.1 The Judicature Act, Cap 13

This Act provides for Alternative Dispute Resolution under courts direction. Sections 26 to 32 of the Act provide for situations when matters can be referred to a special referee or arbitrator to handle where such official has been granted High court powers to inquire and report on any cause or matter other than a criminal proceeding. These provisions read together with section 41 of the Act, which stipulates for the functions of the rules committee given the origin of the Judicature (commercial court division). In some instances, the intensity of the dispute may mean that the parties are not in a position to hear each other out amicably.

The above inevitably leads to seeking redress to court with varying objectives, the most common which are; (1) for court to assist the parties in determining the outcome of the

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<sup>109</sup> Law reform commission, *Alternative dispute resolution: Mediation and Conciliation*, Law reform commission, Dublin, 2010, p 143

case, (2) For the losing party to be punished through damages and costs to the winning party. Sometimes the issues to be resolved are too complex to be resolved through mediation.

However, in spite of the aforementioned scenarios, the **Judicature (Commercial court division) (mediation) rules, 2007**<sup>110</sup> were made operational by the commercial court with effect from 1<sup>st</sup> November 2009, making mediation a mandatory procedure for all litigants with exceptions under sections 9.<sup>111</sup>

#### **5.4 MEDIATION IN UGANDA**

As defined earlier, the term mediation came from the Latin term, mediate" which means, to be in the middle."<sup>112</sup> In the formal use of the term, it is difficult to give it a single exact definition. Scholars argue that it's difficult to define mediation conceptually and every jurisdiction has its own definition.<sup>113</sup>

***"Mediation changes as it travels; its instantiation anywhere is subject to local variation and intervention as it makes contact with state and customary law, politics, and social struggles."***<sup>114</sup>

Despite all the controversy surrounding it, mediation is one of ADR mechanisms in which:

***"Two disputants, with the aid of a third-party intervention, are brought together to craft their own agreement. It is " ... a flexible, non-binding, confidential process in which a neutral person (the mediator) facilitates settlement negotiations. The mediator improves***

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<sup>110</sup>Rules no.SS of 2007.

<sup>111</sup> Ibid

<sup>112</sup>Law reform commission, *Alternative dispute resolution: Mediation and Conciliation, Law reform commission, Dublin, 2010, p 19*

<sup>113</sup> Ibid

<sup>114</sup> Roger E. Hartley, *Alternative Dispute Resolution in Civil Justice Systems, American Legal Institutions, LFB Scholarly Publishing LLC, New York 2002*

***communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute"***<sup>115</sup>

Mediation lies somewhere between negotiation and arbitration. Unlike negotiation, there is a neutral third party that facilitates the discussion between parties in dispute. But, unlike arbitration, the neutral third party has no power to pass a binding decision. Mediation offers best alternative for those who need the assistance of third party as well as to determine their case by themselves. The mediator has no power to impose or compel a settlement. She/he rather helps parties to explore all possible alternatives to reach an agreement. But, unlike arbitration, the neutral third party has no power to pass a binding decision. Mediation is an interest-based mechanism in which parties try to keep their interest, not their legal right. Therefore, mediation changes the, zero sum game" of litigation to a, value creating "agreement between parties."<sup>116</sup>

In Uganda, mediation is a dispute resolution process in which the parties are assisted by acceptable, impartial and a neutral third party (the mediator) who has no decision-making power but assists the parties to the dispute to voluntarily reach an acceptable settlement of the issue in dispute.

Mediation has also been termed as "the interaction between two or more parties who may be disputants, negotiators, or interacting parties whose relationship could be improved by the mediator's intervention. Under various circumstances (determinants of mediation), the parties/disputants decide to seek the assistance of a third party, and this party decides whether to mediate. As the mediation gets underway, the third party

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<sup>115</sup> *Lukasz Rozdeiczer & Alejandro Alvarez de la Campa, Alternative Dispute Resolution*

*Manual: Implementing Commercial Mediation, The World Bank Group, Commercial Small and Medium Enterprise Department, USA, 2006*

<sup>116</sup> A.C.K. Kakooza: Land dispute settlement in Uganda: *Exploring the efficacy of the mediation option*; Uganda Living Law Journal, Vol. 5, June 2007; Uganda Law Reform Commission, 17

selects from a number of available approaches and is influenced by various factors, such as environment, mediator's training, disputant's characteristics, and nature of their conflict. Once applied, these approaches yield outcomes for the disputants, the mediator, and third parties (other than the mediator)."<sup>117</sup> As such, mediation aims to assist the disputing parties in reaching an agreement. Whether an agreement results or not, and whatever the content of that agreement, if any, the parties themselves determine the results as opposed to something imposed by a third party.

The Arbitration and Conciliation Act (as amended) does not make any specific reference to mediation. However, the prevalent Uganda Commercial Court assisted ADR today particularly focuses on mediation as the most appropriate ADR tool and has made significant breakthrough in this regard.

Proponents for ADR, particularly mediation, push for the court annexed mediation with their perspective being the benefits in the procedure but not necessarily what the parties really want as an outcome.

## **5.5 THE IMPACT OF MEDIATION AS A DESPUTE RESOLUTION MECHANISM IN UGANDA**

In Uganda just like other African countries the use of a third party as a neutral in the resolution of disputes is still very common today. In the early 2000, mediation was piloted in the commercial court as an alternative to litigation, and many cases were successfully mediated.

Judicial officers were left with time to try cases which are ordinarily not amenable to mediation hence substantially increasing the productivity of the court, satisfaction and confidence of court users in the justice system.<sup>118</sup> Mediation has been on the increase since the creation of the Centre for Arbitration and Dispute Resolution (CADER) in the

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<sup>117</sup> Wall, et al., 2001:370 in R. Ramirez: *A conceptual map of land conflict management: Organizing the parts of two puzzles* (March 2002) in [http://www.fao.org/sd/2002/IN0301a3\\_en.htm](http://www.fao.org/sd/2002/IN0301a3_en.htm), visited February 26,2007.

<sup>118</sup> Kakooza A.C.K : *Land dispute settlement in Uganda: Exploring the efficacy of the mediation option; Uganda Living* (Law Journal, Vol. 5, June 2007; Uganda Law Reform Commission)17

year 2000 and in between 2003 and 2005 the commercial court division implemented the mediation pilot project whereby cases were referred to the CADER for mediation<sup>119</sup>. Mediation became a permanent feature at the commercial court with the passing of the judicature (mediation) rules 2013. Following the success story at the commercial court, it was decided to roll out mediation at all courts with the gazetting of the mediation rules.<sup>120</sup>

## **5.6 POSITIVE IMPACTS OF MEDIATION AS A DISPUTE RESOLUTION MECHANISM**

### **5.6.1 Confidentiality**

Mediation outcomes are secretive and the resolution of disputes is limited to the parties involved in the mediation process, unless the parties wish to have another party present. The confidential nature of the proceeding protects the awards or deliberation from being published in the press without approval of the parties.<sup>121</sup>

### **5.6.2 Representation**

Because mediation is flexible, the parties involved in the ADR are at liberty to appoint any person of their choice to appear in the proceedings.

In contrast, in formal court proceedings one needs a lawyer to represent them, if they are not capable of affording one, they must appear in person. Therefore, such restraints lead to dragging of disputes in court cases.

### **5.6.3 Costs**

In mediation, parties directly pay the mediator and their representatives. The costs are minimal and limited to a few that might include the structuring of documents and

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<sup>119</sup> Alternative Dispute Resolution a Uganda judicial perspective by Justice Geoffrey, and W.M. Kiryabwire Judge of the commercial division of the High Court of Uganda.

<sup>120</sup> Clare Manuel, Richard Hooper, justice Ben Odoki auspices of the department for international development (uk) and private sector foundation Uganda 23, July 1999.

<sup>121</sup> Clare Manuel, Richard Hooper, justice Ben Odoki auspices of the department for international development (uk) and private sector foundation Uganda 23, July 1999.

procedural strains that are supposed to be followed in court-based litigation. In court-based litigation there are costs like court fees, legal fees and a lot of adjournments that deter the dispensation of justice in Uganda. Mediations are cost effective and do away with the term "Justice is for the rich and those who can afford it."<sup>122</sup>

In a paper by Dennis Byamugisha, he says that "To this level, mediation is irreversible tide that is sweeping all over the world."<sup>123</sup> Uganda has no choice but to fully embrace it. There exists a legitimate mechanism which is cost effective.

#### **5.6.4 Business Relations Are Improved**

It is because the mediators are partial that they try to resolve the disputes amongst the parties by resolving them hurriedly without need for technicalities. Mediators through the techniques used like impartiality, respect of feelings and separation of the issues from the people help to mend the relations between the parties involved.

#### **5.6.5 Speed**

Disputes that undergo mediation are minimal in number; therefore, this makes the mediators committed to resolving the disputes amicably. In court-based litigation a lot of technicalities are involved in the resolution of commercial disputes for example there is need for experts to analyse and critic some technicalities, these include; judges and auditors. The speed is sluggish compared to mediation where parties choose the time, agenda, subject matter and participants.

### **5.7 NEGATIVE IMPACTS OF MEDIATION AS A DISPUTE RESOLUTION MECHANISM**

#### **5.7.1 Enforceability**

Decisions not made by court lack a legal backing and are difficult to enforce. This would describe "mediation as a system non-binding."<sup>124</sup>

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<sup>122</sup> A paper presented by Dennis Byamugisha G Director Civil Litigation on page 1

<sup>123</sup>A paper presented by Dennis Byamugisha G Director Civil Litigation on page 1

### 5.7.2 Finality

There is in general no right of appeal in mediation; therefore, the court has limited power to set aside the award.<sup>125</sup> In **Tropical Bank Limited V Jimmy Mukasa**.<sup>126</sup>

*“... in the instant case, I am afraid all the complaints of the application do in reality amount to grounds for appeal against the mediation awards. I am inclined to state that in this application the applicant sought to appeal the merits of the underlying dispute, under the guise of an application to set aside ... the courts must be wary of the temptation to re-open the merits of the dispute ... by agreeing upon the parties have removed the merits of the dispute from consideration by court.”*

This clearly shows that ADR sometimes is an unfair mode of commercial dispute settlements.

It is the above issues that are present even in the republic of Zambia. These very negatives make mediation non-progressive for commercial entities in the country. For this reason, it is paramount that a tribunal that is solely focused on commercial disputes is ideal to settle disputes in the republic of Zambia. This is with the view of safeguarding the needs and interests of commercial entities and guaranteeing the growth of companies unlike the current circumstances where they have to resort to costly litigation or use ADR which is not beneficial at all.

## 5.8 CONCLUSION

The purpose of this chapter has been to explore ADR and mediation specifically, for the purpose of disclosing its disadvantages on the growth of the commercial entities in the Republic of Zambia. It has further discussed how Uganda and its ADR laws operate.

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<sup>124</sup> Ibid

<sup>125</sup> Appeal No 46/2004 arising out of arbitration cause No 34/2002

<sup>126</sup> Ibid

## **CHAPTER SIX**

### **SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS**

#### **6.0 CONCLUSION AND RECOMMENDATION**

An essential component of any functional legal system is law reform. Globally, there appears to be a general consensus that the application of law can be utilised to foster trade and economic expansion. Since the early 1990s, Zambia has seen a number of business sector reforms, suggesting that this philosophy is taking hold here. Creating an investor-friendly business regulatory environment has been the main focus of these reforms. The focus areas of these reforms have included the cost of doing business generally and the cost of dispute resolution specifically. In terms of conflict resolution, the High Court Rules of 2012's Order 53 established the commercial list with the goal of quickly resolving commercial disputes.

Within the framework of the Companies Act in the Republic of Zambia, this chapter suggests additional reforms in the field of commercial dispute resolution. It suggests creating a Company's Tribunal in an effort to increase Zambia's competitiveness in terms of business-friendly environment. Therefore, before advancing submissions for the creation of a tribunal and the suggestions for the kind of tribunal that would be appropriate for Zambia, it is pertinent that a summary of the main findings from the earlier chapters is presented.

#### **6.1 SUMMARY OF FINDINGS**

Since most offences under Zambian law are tried in the lower courts, the High Court of Zambia is the principal forum for resolving disputes pertaining to the Companies Act, especially those involving civil cases. The legal system can be costly, time-consuming, and complicated. According to the Act, alternative dispute resolution procedures are relegated to the periphery. For instance, mediation is court-annexed in the sense that it is started by the High Court, and arbitration, while permitted by order of the High Court, is typically used where a

previous agreement requires the parties to submit disputes arising from a contract to arbitration.

Given the administrative nature of some of these decisions, an analysis of pertinent provisions under the Companies Act has found one particularly problematic: the general provision stating that decisions made by the registrar in the course of performing or purportedly performing the registrar's functions under the Act may only be appealed to the High Court. Furthermore, given that appealing a registrar's decision to the High Court may not be a financially prudent course of action, the registrar is essentially the final arbiter in many of the decisions over which the registrar is empowered by the Act. In order to guarantee that a suitable Companies Act dispute resolution framework has been identified, it is necessary to reconsider the question of recourse against the registrar's decisions.

Furthermore, it has been determined that the Companies Act's growing list of offences is another part of the Act's dispute resolution structure that requires revision. It has been noted that certain Act violations that result in criminal penalties may also be resolved administratively. The case put forth in favour of noncriminal sanctions, especially for offences that only carry a fine, is that the current state of affairs might potentially stifle business growth and development, not to mention make doing business easier.

A comparative analysis of current developments in company law dispute resolution has been conducted in order to inform the reform's nature. In this chapter, Australia, South Africa, and India are being compared. It is a well-known fact that these nations are larger than Zambia in terms of geography, population, and economy. Nonetheless, their shared common law heritage and, in the case of South Africa, its close proximity to Zambia have been cited as the primary justifications for their study

Depending on the type of dispute, there are four options for resolution under the South African company law dispute resolution model. Despite the recognised inherent risk of uncertainty in the law, which relates to the possibility of differing rulings on cases that are substantially similar by the various dispute resolution forums, the South African approach to company law dispute resolution has been praised for its creativity and advancement.

Having said that, it has been observed that, in terms of the Companies Act 2008, South African courts continue to have jurisdiction over a broad range of issues, even though that jurisdiction is typically not exclusive. However, it has been determined that the South African courts have less jurisdiction than those in Australia. Additionally, it has been determined that the Companies Act 2008 has far fewer offences than the Corporations Act. In South Africa, the courts have the authority to call shareholder meetings, remove an individual from their position as a director, and mandate the winding up of a business.

It has been noted that the Companies Tribunal serves as both an adjudication body and a forum for alternative dispute resolution, despite the fact that no one has yet approached the tribunal about the latter. The tribunal can hear cases involving disputes over company names, extensions of deadlines for filing annual returns, and calls for shareholder meetings. Similar to the Administrative Appeals Tribunal, the Companies Tribunal has demonstrated a commendable level of promptness in rendering decisions thus far. That the Companies Tribunal has so far performed fairly well in so far as timeous delivery of decisions is concerned.

India, it has been discovered, represents a radical departure from the predominantly court-based company law dispute resolution models in many common law countries. Not only does the Companies Act 2013 clothe the National Company Law Tribunal with jurisdiction over a wide array of matters, it provides that an appeal from a decision of the tribunal lies to the National Company Law Appellate Tribunal. It has also been discovered that the Indian

model grants to members of the two tribunals such tenure as is applicable to Judges.

The study of the Indian company law dispute resolution model has also revealed that offences in terms of the Companies Act 2013 are tried by courts and the central government may set up fast-track courts to try the offences.

A clear indication has emerged that the Administrative Appeals Tribunal, the Companies Tribunal and National Company Law Tribunal offer welcome relief for the often-overburdened courts in so far as resolution of disputes is concerned. In the case of the Companies Tribunal, the feeling is that it has arguably enhanced South Africa's competitiveness vis-à-vis the ease of doing business owing to its charge free services and often timeous delivery of decisions. It is yet to be seen what kind of impact on company law dispute resolution the National Company Law Tribunal will have considering that it is not yet operational.

## **6.2 A PROPOSED COMPANIES TRIBUNAL FOR ZAMBIA**

The starting point is a general reiteration of the arguments advanced in the first chapter on the advantages associated with tribunals. On the specific advantage of affording a cheaper alternative to court litigation, the paper has indicated that lowering the cost of dispute resolution is one of the factors considered as enhancing the ease of doing business.

1. A Companies Tribunal that assures low cost dispute resolution, like the South African Companies Tribunal, would most likely influence Zambia's ranking with regard to ease of doing business positively especially against the backdrop of an expensive commercial court process.
2. The flexibility and informality associated with tribunal proceedings assist in ensuring speedy disposal of matters – an attribute widely accepted as preferred by the business community.

3. If the qualifications for appointment as member of the South African Companies Tribunal are anything to go by, a Companies Tribunal for Zambia presents an opportunity for the appointment of members who have expertise in company law as well as commerce generally. This is generally in contrast with the current situation where a Judge of the High Court can be allocated a matter in any branch of law irrespective of the Judge's area of expertise.
4. The Registrar currently wields too much unchecked power in terms of the Companies Act. This presents the risk of lack of accountability and may result in arbitrary decisions being made on the understanding that it is unlikely that an aggrieved person would go to court to challenge such decisions in most cases. Therefore, making the Registrar's decisions amenable to the jurisdiction of the proposed tribunal would go a long way in assuring accountability and availing a platform to people to challenge decisions they may be aggrieved with in a friendly, flexible, cheap and informal setting.
5. The need to provide for non-criminal sanctions in respect of some of the offences created by the Companies Act would result in an overburdening of the courts if not implemented. This would likely have the effect of making litigation costlier and time consuming. Conversion of some of the offences to civil wrongs in respect of which the proposed tribunal would have jurisdiction would certainly make the courts' burden lighter.
6. As the comparative study in the preceding chapter has shown, there seems to be recognition internationally that the courts may not be adequately responsive to the need for speedy, informal, flexible and cheap resolution of disputes. It is asserted that Zambia's establishment of a Companies Tribunal would be in tune with growing international best practice in the area of company law dispute resolution.

7. As the African continent pursues regional integration, harmonisation of business laws to boost intra-regional trade is ever becoming more imperative. It is posited that, with South Africa leading the way in setting up a Companies Tribunal for the resolution of some company law disputes and Zambia – to the extent possible and appropriate for the jurisdiction – following suit, some more ground would have been laid for the harmonisation of countries' company law dispute resolution frameworks owing to similarities in approach. The idea might seem remote presently but could prove useful in informing the harmonisation agenda vis-à-vis dispute resolution in regional company law.
  
8. Tribunals are not a strange phenomenon in Zambia. A number of statutes dealing with certain specialised areas of the law provide for tribunals. However, the operations of the existing tribunals have not been without challenges. Nonetheless, these challenges should not be seen as an indication that tribunals have no place in Zambia. Rather, the challenges should be examined and measures proposed to ensure that the proposed Companies Tribunal is not beset by similar challenges if avoidable. In any case, it has been stated that the Administrative Appeals Tribunal and the South African Companies Tribunal, though fairly successful, face some challenges in the performance of their respective mandates.

### **6.3 A COMPANIES TRIBUNAL FOR ZAMBIA**

It is not in doubt that a Companies Tribunal is necessary for Zambia. The question that remains is: what kind of tribunal should it be? In answering this question, recommendations regarding its membership and jurisdiction are given hereunder. These recommendations obviously draw from the Companies Act dispute resolution framework against the backdrop of the comparative perspective presented in chapter three.

1. In so far as membership or composition of the respective tribunals considered in this paper is concerned, only India makes provision for

tenure similar to the tenure enjoyed by Judges generally. South Africa and Australia provide for fixed terms. The practice with regard to tenure of tribunal members in Zambia is similar to the Australian and South African approach. Therefore, the members of the proposed tribunal should serve for fixed terms as has been the practice with other tribunals.

In Australia, a prominent qualification for appointment as a member of the Administrative Appeals Tribunal is enrolment as a legal practitioner. In the case of South Africa, qualifications in law and commerce related fields suffice. In India – and perhaps that is why there is a petition pending in the Supreme Court regarding membership eligibility requirements – the qualifications include eligibility for appointment as a Judge. The South African eligibility criteria are recommended for Zambia because of their representativeness in terms of relevant expertise in the field not only of law but commerce as well.

2. It is also recommended that members be appointed on a part-time basis for a start because retaining fulltime members may be very costly to the government. The legislation to establish the proposed tribunal should empower the Minister responsible for trade and industry to appoint members on fulltime or part-time basis so that, with time, there is flexibility in the nature of appointment depending on cost sustainability and demand for the proposed tribunal's services. The South African approach is informative in this regard.
  
3. Caution is urged in determining the nature of a tribunal suitable for Zambia so that there is no wholesome transplantation of a particular jurisdiction's approach. A hybrid tribunal suitable to Zambia is recommended. In this regard, it is proposed that decisions of the registrar relating to incorporation and conversion of companies, company accounts, audit, annual returns, and foreign companies should no longer

be appealable to the High Court. They should be amenable to the exclusive jurisdiction of the proposed tribunal in order to render the remedies envisaged in the right to challenge such decisions relevant and practicable. In other words, the proposed tribunal should, somewhat like the Administrative Appeals Tribunal, be clothed with authority to review decisions of the registrar falling in the categories specified above.

4. In addition to the power to review most of the decisions of the Registrar, it is recommended that the proposed tribunal be empowered to determine matters – currently vested in the High Court – relating to the incorporation, membership (except in respect of rectification of members or debenture holders registers where the issue hinges on entitlement to be entered in or removed from the register), management and administration of companies. This is because most of these are of such an administrative nature as to be best resolved by an administrative tribunal as opposed to the courts.
5. It is also recommended that Companies Act offences punishable by a fine should be made civil wrongs over which the proposed tribunal should have jurisdiction and be empowered to impose administrative fines. Conferring power on the proposed tribunal to impose administrative fines would be a departure from the South African approach where only the courts can impose such fines. In the Zambian context, it would not be a novel development for a statutory body to have power to impose administrative fines. It is noteworthy that a close look at most of these minor offences reveals that they are infractions that need not be criminal in nature and thus suited to resolution by an administrative tribunal.
6. The status quo should be maintained in respect of the High Court's jurisdiction over securities, fundamental transactions and winding-up. In addition, the more serious offences – those punishable by fine or

imprisonment – should be maintained as such and remain within the province of the courts. This is obviously because a largely administrative tribunal is not the appropriate forum for dealing with such complex matters and offences.

The South African innovation of mandating the Companies Tribunal to be an alternative dispute resolution forum, though yet to be tested, is recommended for Zambia in light of the peripheral role alternative dispute resolution appears to be playing under the current company law dispute resolution model.

It is expected that these recommended reforms to the Zambian company law dispute resolution framework will contribute to enhancing the country's competitiveness with regard to the ease of doing business. These proposed reforms could not have come at a better time than now when the Companies Act is undergoing review. It is hoped that the proposals will be taken on board and eventually be incorporated in the legislation that will come out of the review process.

#### **6.4 CONCLUSION**

It has been argued through this thesis that for the commercial environment to be progressive in Zambia, it is paramount that the dispute resolving method that takes into consideration the challenges faced by companies is established. For this reason, the author proposes the establishment of a tribunal separate from litigation and other types of tribunals.

*Word count: 17096*

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